

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

FILED

AUG 26 2008

TIMOTHY W. CLAY,

Plaintiff,

VS.

ASST. DIST. ATT. FERN SMITH et al.,

Defendants.

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY W. H. DEPUTY

No. CIV-08-85-W

ORDER

On June 17, 2008, United States Magistrate Judge Robert E. Bacharach issued a Report and Recommendation in this matter and recommended that the Motion to Dismiss filed by defendant Anne Folmar (now LaPuzza) be denied. The parties were advised of their right to object, and the matter now comes before the Court on Folmar's Objection to the Report and Recommendation.

Upon de novo review of the record, the Court concurs with Magistrate Judge Bacharach's suggested disposition of Folmar's Motion to Dismiss. Magistrate Judge Bacharach properly limited his review to "the four corners of [Clay's amended] complaint[.]" Jojola v. Chavez, 55 F.3d 488, 494 (10th Cir. 1995)(citation omitted), and while he was permitted to take judicial notice of matters of public record, Magistrate Judge Bacharach was not required to do so. E.g., Tal v. Hogan, 453 F.3d 1244, 1265 n.1 (10th Cir. 2006)(facts subject to judicial notice may be considered).

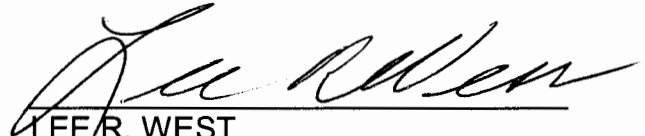
Furthermore, Magistrate Judge Bacharach properly disregarded the newly presented arguments and authorities raised in, and the exhibits attached to, Folmar's reply.

E.g., United States v. Mora, 293 F.3d 1213, 1216 (10th Cir. 2002)(arguments raised for the first time in reply brief need not be considered).

Accordingly, the Court

(1) ADOPTS the Report and Recommendation [Doc. 47] issued on June 17, 2008;
(2) DENIES Folmar's Motion to Dismiss [Doc. 36] filed on May 6, 2008; and
(3) RE-REFERS this matter to Magistrate Judge Bacharach for further proceedings, including consideration of Clay's Motion for Summary Judgment [Doc. 59] file-stamped July 25, 2008, and his Motion for Summary Judgment [Doc. 60] file-stamped July 29, 2008, and Folmar's Motion to Strike, or Alternative Motion for Extension of Time to Respond [Doc. 63] filed on August 11, 2008.

ENTERED this 26th day of August, 2008.


LEE R. WEST
UNITED STATES DISTRICT JUDGE